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82-332

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MAS FUJIMOTO, DELMER EISERT,
ROBERT GUY and AGNES GUY, Petitioners,

v.

CITY OF HAPPY VALLEY, et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fifth Amendment's Just Compensation Clause, as applied to the Due Process Clause of the Fourteenth Amendment, prohibit the City of Happy Valley from depriving landowners in the City of all economically viable uses of their property for a period of not less than seven years by enacting a comprehensive plan and zoning ordinance which designate the property for open space and low density residential use and which sets forth development criteria which prevent the landowners from developing the property in accordance with reasonable, investment-backed expectations; by simultaneously preventing the installation of sanitary sewers, which would enable the landowners to meet development criteria in the plan and ordinances; by declaring a moratorium

on development applications; by rejecting development applications submitted by the landowners; and by delaying the adoption of a revised plan, development ordinance and facilities plan mandated by Oregon law?

2. Does 42 USC §1983 prevent the City and its officials from depriving landowners in the City of all economically viable uses of their property by engaging in such conduct, and, further, require compensation for the deprivation of such use for the period of deprivation?

3. May the City avoid compensating landowners for deprivation of all economically viable uses of their property for a period of at least seven years merely by enacting a comprehensive plan and zoning ordinance in 1980, which arguably designates the landowners' property for development rights and which

revises the 1973 comprehensive plan and zoning ordinance, which precluded such rights.

4. Do landowners forfeit constitutional and statutory rights to compensation for such deprivation by challenging the validity of the City's 1980 comprehensive plan and zoning ordinance under state law in proceedings before the Land Conservation and Development Commission; alternatively, must the federal district court abstain from deciding the temporary taking claim during the pendency of state proceedings.

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* The complaint named as defendants, in addition to the City of Happy Valley, the Mayor of the City of Happy Valley, James Robnett, the members of the City Council of Happy Valley, Donald Stuck, Joseph Cannard, Sandra Coats, Richard Shaffer, William Ross, the members of the Planning Commission of Happy Valley, James Grady, Ed Rebstock, Kermit Schneider, Kenneth Quick, Larry Dawson, Sandra Roth, Corey Gustafson, the City Engineer, Michael Bye and the Citizens' Advisory Council Chairman, Larry Frey

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No._____

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MAS FUJIMOTO, DELMER EISERT,
ROBERT GUY and AGNES GUY,

Petitioners,

v.

CITY OF HAPPY VALLEY, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 29, 1982.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, not to be published,

appears in the appendix hereto. The opinion of the District Court for the District of Oregon appears in the appendix as well.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 29, 1982. A timely petition for rehearing was denied and a suggestion for rehearing en banc was rejected on May 27, 1982, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment, Due Process Clause.

> [N]or shall any state deprive any person of life, liberty or

> property, without due process of law . . . .

United States Code, Title 42:

> Section 1983. Civil action for deprivation of rights.
>
> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Each of petitioners has owned undeveloped real property in the City of Happy Valley, Oregon, since 1970, collectively comprising 150 acres. Petitioners seek to develop their land for residential purposes. The City was incorporated in 1965 to prevent annexation of the area by the City of Portland. In 1970, the City adopted a zoning ordinance

designating petitioners' land for one residential unit per 20,000 square feet.

In 1973, the City adopted a comprehensive plan, which is the controlling land use document under Oregon law. Portions of petitioners' property were identified as "open space" on the comprehensive plan map. The remainder of petitioners' property was designated for residential construction subject to minimum lot size criteria based upon the suitability of the soil for subsurface sewage disposal. Because of soil characteristics of petitioners' land, their property could not be developed in an economically feasible way for residential use under the criteria established in the comprehensive plan without the installation of sanitary sewers. Although the comprehensive plan contained the assumption that sewers would

ultimately be installed, the City has failed to prepare a facilities plan to remedy sewage disposal problems within the City. Soil characteristics also rendered petitioners' property unsuitable for agricultural or forestry production. In 1973, the Oregon Legislature required all cities and counties to adopt and revise comprehensive plans and implementing ordinances in compliance with statewide planning goals promulgated by the newly created Land Conservation and Development Commission, to be effective in 1975. Cities in the metropolitan Portland area were also required to comply with the plans and policies of the Columbia Region Association of Governments, the designated regional planning agency.

In 1976, the City prompted the regional planning agency to classify it as a rural area on the regional plan map.

Under regional policies, sewers could not be extended into areas so classified. All other cities in the region were classified as urban areas on the regional map. Petitioners appealed the decision of the regional planning agency as a violation of statewide planning goals before the Land Conservation and Development Commission. The City's rural designation was invalidated and it was subsequently identified as an urban area on the regional plan map.

In 1976, the City initiated the process of revising its comprehensive plan. In September 1977, the City enacted a moratorium on the partitioning of lands within the City until the revised comprehensive plan for the City was adopted. In November, 1977 the City enacted a 1.5 acre minimum average lot size for residential construction. In May, 1978, the City expanded its moratorium to include the

subdivision of land.

Petitioners have made repeated attempts to obtain development rights and to procure sanitary sewers for their property. The City failed to act upon subdivision proposals submitted by petitioner Mas Fujimoto in the years 1972 and 1976. The City denied the request of petitioners Robert and Agnes Guy for annexation of their property to the County Service District for the purpose of obtaining sewer service. In August, 1977, the City opposed the petitioners' efforts to withdraw their property from the City for the purpose of obtaining sewer service. The City refused to accept subdivision proposals drafted in accordance with the City's subdivision ordinance in May, 1978 and instead revised the moratorium on partitioning of land to include a moratorium on subdivisions.

Because this matter was disposed of on Respondents' motion for summary judgment, the foregoing facts are those alleged in petitioners' complaint and in affidavits and other documentation submitted during summary judgment proceedings. Because the Ninth Circuit Court of Appeals made inquiries during oral argument, the following facts are also material to the case.

The City adopted a new comprehensive plan and a land development ordinance replacing the 1973 comprehensive plan and 1970 zoning ordinance in August, 1980. The City petitioned the Land Conservation and Development Commission for review of its plan and ordinances for compliance with statewide planning goals in September, 1980. Petitioners, together with other agencies and organizations, have contested the validity of the plan

during these proceedings and have advocated higher residential densities for the City than those proposed in the new plan.

Petitioners brought this action in the federal district court for the District of Oregon on May 26, 1978. Petitioners claimed that their property had been taken without the payment of just compensation as required by the Fifth and Fourteenth Amendments of the United States Constitution and that the conduct of the City and its officials constituted a violation of 42 USC §1983. Petitioners sought 2.2 million dollars in damages. Jurisdiction was premised upon 28 USC §1331 and §1343 and under the Fifth and Fourteenth Amendments of the United States Constitution.

The matter came before a magistrate upon the respondents' motion for summary

judgment. The magistrate recommended, and the District Court concluded, that the federal court should retain jurisdiction but abstain from decision on the federal issues pending adjudication of state law questions in state court. Petitioners appealed the abstention ruling to the Ninth Circuit Court of Appeals. The Court of Appeals reached the merits of the case, concluding that petitioners' complaint failed to state a claim upon which relief could be granted and dismissed the action.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of this Court as to the proper interpretation of the Just Compensation Clause of the Fifth Amendment, as applied through the Due Process Clause of the Fourteenth Amendment.

The opinion of the Ninth Circuit below reduces inverse condemnation analysis

involving land use to a single principle: where the plan and ordinances of a municipality provide for residential use of the property at a density equivalent to that in this Court's decision in Agins v. City of Tiburon, 447 U. S. 255 (1980), there can be no taking. In reaching this conclusion, the Court misconstrues applicable federal law and misstates applicable facts. If allowed to stand, the decision assures that no taking claims involving land use regulations will ever go to trial in the Ninth Circuit. The opinion also can be expected to have an effect on the State of Oregon in its attempts to interpret the just compensation provisions of the federal constitution and of the equivalent provisions of the state constitution in the context of mandated statewide land use planning.

In Penn Central Transportation

Company v. City of New York, 438 U. S. 104 (1978), this court established unequivocally that "police power" activities, also known as "regulation", may result in an unconstitutional taking of property under the Fifth and Fourteenth Amendments of the United States Constitution. Although the court ultimately determined that no taking had occurred in the case because the plaintiff had been able to realize its "primary" expectation for use of the property, the court affirmed the principles and standards first established in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415 (1922): "when regulation goes too far it will be recognized as a taking." The court variously stated the standards for regulatory takings. Characterizing taking claims as "essentially ad hoc, factual inquiries", the court stated that the validity of allegedly confiscatory

regulations would depend upon "whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].' [Citations omitted]. That inquiry may be narrowed to the question of the severity of the impact of the law on the appellant's parcel...." 438 U. S. at 136. Inquiry would also proceed into "the extent to which the regulation has interfered with distinct investment-backed expectations." Id. at 124. Finally, the court stated that constitutionally valid regulations might become confiscatory should the use of the land cease to be "economically viable." Id. at 138, n. 36. These various statements of the standards for inverse condemnation are organized under the principle of fundamental "fairness and justice" first articulated in the

decision of Armstrong v. United States, 364 U. S. 40, 49 (1960), holding that the just compensation clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

In Agins v. City of Tiburon, 447 U. S. 255 (1980), this court again considered the question of regulatory takings. Again, the standards were clearly stated: when regulation "denies an owner economically viable use of his land", it constitutes a taking. Id. at 257 (1980), citing Penn Central Transportation Company, supra, 438 U. S. at 138, n. 36. The Court went further to identify the method of analyzing regulations under the Fifth Amendment's Just Compensation Clause. Plaintiffs had claimed that the designation of their

property for open space and low density residential use constituted inverse condemnation. The matter was decided on demurrer. The Court concluded that the ordinance under California law allowed a viable use on its face, viz., the construction of one residential unit per five acres. Since the plaintiffs had not submitted a development application or otherwise caused the zoning ordinance to be applied to their property, the Court would not look beyond the face of the ordinance.

The Agins requirement that landowners bring plans and ordinances to bear on development proposals might be regarded as exhaustion of administrative remedies or, alternatively, ripeness for judicial review. The challenge in Agins was to the face of the ordinances. Plaintiffs were unsuccessful because they failed

to have the ordinance applied to their intended use of the property. Had they done so and had the application of the ordinances deprived them of all economically viable uses of the property, a taking would have occurred. Where a landowner undertakes such steps, the reviewing court must go beyond the face of the ordinances to consider all the factual circumstances in order to determine whether a taking has occurred. The opinion of the Ninth Circuit in the instant case reverses the logic of Agins by concluding that events after the enactment of the plan and ordinances were irrelevant.

In the instant case, the enactment of the 1973 comprehensive plan by the City, which restricts the use of the petitioners' lands, is only one allegation in a series of transactions by city officials resulting in the confiscation of the property. The

reviewing court must determine the collective impact of regulatory activities in deciding whether a taking has occurred. Under Oregon law, the comprehensive plan is the controlling land use document and inconsisting zoning ordinances must fail. Baker v. City of Milwaukie, 217 Or. 500, 513-14, 533 P. 2d 772 (1975). The 1973 comprehensive plan enacted by the City was effective upon its adoption and remained in effect until replaced by a revised plan. Or. Rev. Stat. 197.275(1) (1977 Rep. Pt.), repealed 1981 Or. Laws, c. 748, Section 56. (In this regard, the opinion misstates Oregon law in presuming that the comprehensive plan for the City was not "final".)

Under Oregon law, the comprehensive plan map and the policy statements contained in the plan must be taken together in determining the effect of the

plan on a particular parcel. Green v. Hayward, 275 Or. 693, 552 P. 2d 815 (1976). The 1973 plan contained development guidelines which determined residential density under the plan. Those portions of the petitioners' lands which were not designated as open space on the plan map could be used for residential purposes only as set forth in the development guidelines. The guidelines required the installation of either sanitary sewers or septic tanks which complied with state regulations prior to residential development. Consultants for the petitioners submitted affidavits demonstrating that the petitioners' lands could not be used for subsurface sewage disposal because of poor soil characteristics and hence could not be profitably developed for residential use without the installation of sanitary sewers. The affidavits also concluded

that agricultural or forestry production on the property was not a viable economic use.

The landowners made several attempts to obtain sewer service for their property. The City, on the other hand, publicly advocated a regional classification which would have prevented the installation of sewers to the property. Petitioners successfully opposed the classification, leading to the reclassification of the City as an urban area on the regional map. The petitioners also attempted to withdraw their lands from the City in order to obtain sewer service. The City oppossed such efforts. The City further delayed the adoption of a facilities plan, which would have provided for city-wide sanitary sewers.

Petitioners went beyond these efforts, however, and submitted development

applications under the City's ordinances. The City refused to accept such applications and, further, extended a moratorium to include subdivision proposals.

These facts bear no resemblance to those in the Agins decision. Under the facts before the Court, petitioners have done every act within their power to apply the comprehensive plan and ordinances of the City to their property. They retained consultants to analyze the development guidelines in the City's plan. They attempted to obtain sewer service on several occasions. Finally, they submitted development applications in order to "test" the application of the City's plan and ordinances.

The Ninth Circuit's opinion forecloses constitutional review of most, if not all, land use regulations, contrary to this Court's directives. It would be a rare

plan or ordinance indeed that did not arguably permit some use of the land. Surely Agins was not intended to establish a factual threshold against which other ordinances and plans can be measured.

If federal courts will not look beyond the face of the ordinance, the municipal duty to avoid confiscatory regulation can be satisfied merely by patent designation of land for some arguably viable use. Municipalities will be free thereafter to adopt conflicting regulations, deny consistent development applications or otherwise abuse the police power with impunity.

The Ninth Circuit's opinion will undoubtedly have an impact on state court interpretation of the federal constitution and, in all probability, the state constitution. Article I, Section 20 of the Oregon Constitution has been determined to

be the "mirror image" of the Fifth Amendment's Just Compensation Clause. Lincoln Loan Co. v. State Highway Comm., 274 Or. 49, 52, n. 2, 545 P. 2d 105 (1976). In Fifth Avenue Corp. v. Washington County, 282 Or. 591, 614, 581 P. 2d 50 (1978), the Oregon Supreme Court attempts to formulate its own standard for regulatory takings, stating that a taking may occur when there are no "economically feasible private uses" remaining under the applicable plan classification. This formulation is itself the subject of debate. See generally, Morgan & Shonkwiler, Regulatory Takings in Oregon: A Walk Down Fifth Avenue Without Due Process, 16 Willamette L. Rev. 591 (1980); Leeson & Sullivan, Property, Philosophy and Regulation: The Case Against a Natural Law Theory of Property Rights, 17 Willamette L. Rev.

527 (1981). In view of the pervasiveness of land use planning in the State of Oregon, federal constitutional provisions which condition police power enactments should be carefully construed by the federal courts in order to avoid adverse impacts on the State's attempts to strike a balance between private property rights and public welfare.

2. Certiorari should be granted to decide unsettled law concerning the liability of municipalities for temporary takings, the appropriateness of compensation for confiscatory regulations under the Fifth and Fourteenth Amendments, alternatively, under 42 USC §1983, and the duty to exhaust State administrative and judicial remedies before a federal court will exercise jurisdiction over a regulatory taking claim.

This case presents unique facts which

will enable this Court to decide important principles of law relating to the exercise of federal jurisdiction over a claim brought pursuant to the Fifth and Fourteenth Amendments, alternatively pursuant to 42 USC §1983, involving land use regulations. The following issues derive from the Ninth Circuit's interpretation of federal law applied to the facts of the case.

(1) Interim damages for confiscatory land use regulations. The opinion below apparently identifies all transactions after the adoption of the 1973 plan with petitioners' claim for a "temporary taking." The Court relies upon a footnote in the Agin decision directed toward the City's alleged "precondemnation activities." (The City had initiated eminent domain proceedings and abandoned those proceedings within one year.) This Court held that "good faith planning activities" during

the pendency of eminent domain proceedings would not amount to a taking "absent extraordinary delay." 447 U. S., supra, at 262, n. 9. Without analysis, the Ninth Circuit concludes that the facts in the instant case "do not come within the narrow exceptions enumerated in Tiburon." Opinion, p. 2.

The Ninth Circuit's expansion of the principles stated in Agins swallows the concept of regulatory taking. Had the Court of Appeals taken cognizance of Justice Brennan's dissenting opinion in San Diego Gas & Electric Co. v. City of San Diego, 450 U. S. 621 (1981), as urged by petitioners, it could not have ruled as it did. As in Agins, that case arose out of the regulatory activities of the defendant municipality. Justice Brennan would have reached the merits of the case to decide the question of whether

compensation was an appropriate remedy for confiscatory land use regulation. Under Brennan's analysis, the just compensation provisions of the Fifth Amendment are self-executing: once a taking has occurred, compensation is due.

In reaching this conclusion, Justice Brennan apprehended a fundamental characteristic of regulatory taking cases: unlike the effects of a municipality's physical dominion over property, confiscatory impacts of regulatory activities can be overcome in most instances by the enactment of amendatory regulations. Mere invalidation of confiscatory regulation, Brennan reasoned, does not provide the fundamental protection inherent in the Fifth Amendment's guaranty that property shall not be taken without just compensation. In fact, confiscatory

regulations can be amended at the whim of the municipality. In keeping with this analysis, Brennan would have offered municipalities the option of rescinding confiscatory regulations and paying interim damages in lieu of instituting eminent domain proceedings to acquire the fee interest. A plurality of the Court in San Diego Gas, joined by Justice Rehnquist in a concurring opinion, held that the Court did not have jurisdiction over the taking claim because the issue of a taking had not been finally decided by the State of California. However, Justice Brennan's analysis was followed in the case of Hernandez v. City of Lafayette, 643 F. 2d 1188 (5th Cir. 1981), cert. denied, 102 S. Ct. 1251 (1982).

The concept of temporary taking is inextricably bound with the issue of compensation for deprivation of property

rights. Federal and state courts will continue to wrestle with the problem of subsequent enactments which modify or negate the confiscatory impacts of previous regulation. The Court should take this opportunity to establish guidelines for the review of regulatory taking cases.

(2) Relationship between exhaustion of administrative remedies and exercise of federal jurisdiction. Once an amendatory ordinance is enacted, the issue arises as to the effect on a pending taking claim in federal court premised upon previously confiscatory regulations. Several subsidiary questions arise. Where the ordinance arguably provides for development rights, must the property owners have the regulations applied to their property in order to continue litigation under the principles announced

in Agins? Conversely, if the property owners do engage in administrative or judicial proceedings to challenge or determine the effect of the new regulation, will their participation negate a claim for interim damages? Alternatively, must the federal court abstain from deciding the federal questions until the effect of the new regulation can be determined?

In the instant case, amendatory regulations were not enacted until seven years after the adoption of confiscatory regulations by the City of Happy Valley. The federal district court would have abstained because of pending administrative proceedings before the Land Conservation and Development Commission concerning the validity of the City's planning efforts under the doctrine of Railroad Commission v. Pullman Co.,

312 U. S. 496, 61 S. Ct. 643 (1941). The Ninth Circuit's opinion makes no express reference to the enactment of the 1980 comprehensive plan. The opinion, however, implies that subsequent proceedings have no effect on the underlying taking action. It further intimates that the petitioners' participation in such proceedings adversely affects their temporary taking claim.

If this Court adopts Justice Brennan's dissent in San Diego Gas, the only effect of an amendatory plan and ordinances, where the period of deprivation of property rights has been substantial, should be to fix the time period for analysis of the "temporary taking" claim. Landowners who have had their property rights confiscated by municipal regulations and who have exhausted their administrative remedies under such enactments should not be required to await prospective local

legislative changes before prosecuting a taking claim in federal court. To do so would be to jeopardize their claim altogether, insofar as the statute of limitations would presumably run from the date of enactment of the confiscatory regulations.

In this case, petitioners chose to contest the City's new plan and ordinances before the Land Conservation and Development Commission as contrary to state law rather than to have the plan and ordinances apply to specific development proposals. Public policy supports this position, in that landowners should not be required to proceed under a plan and ordinances which are in conflict with state law simply to preserve federal constitutional rights. Apparently no appellate court has considered this aspect of the taking question. There is

precedent for petitioners' course of action under Sixth Camden Corp. v. Township of Evesham, 420 F. Supp. 709 (D. N. J. 1976). The plaintiff therein succeeded in overturning a municipal ordinance on state law grounds during the pendency of a federal taking action. The federal district court authorized a trial on the matter of whether a temporary taking had occurred, notwithstanding the fact that the plaintiff had obtained development rights in the interim. See also Gordon v. City of Warren, 579 F. 2d 386 (6th Cir. 1978); Barbaccia v. County of Santa Clara, 451 F. Supp. 260 (N. D. Cal. 1978). Applied to the facts of the instant case, should the City's plan and ordinances fail under state law, the period for the temporary taking claim would be extended to the time that the City adopts complying plans and

ordinances. Such extension would be accomplished through proceedings on supplemental pleadings or through the severance of the liability issue from the damages issue in the taking claim.

The alternative available to the District Court would be to abstain during the pendency of state proceedings on the validity of the plan and ordinances. Until recently, the Ninth Circuit almost invariably abstained from reviewing taking challenges to land use regulations on the ground that land use was a sensitive area of social policy. This blanket abstention doctrine was seldom accompanied by an analysis of which issues of state law remained undecided in the context of taking claims. See, e.g., Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F. 2d 1092 (9th Cir. 1976); Newport Investments,

Inc. v. City of Laguna Beach, 564 F. 2d 893 (9th Cir. 1977); Sederquist v. City of Tiburon, 590 F. 2d 278 (9th Cir. 1978); Isthmus Landowners Assoc. Inc. v. State of California, 601 F. 2d 1087 (9th Cir. 1979); but see American Savings & Loan Assoc. v. County of Marin, 653 F. 2d 364 (9th Cir. 1981). The position of the Ninth Circuit contrasts with that of other circuits, which have undertaken the review of constitutional claims related to land use regulation. See, e.g., Hernandez v. City of Lafayette, supra; Nasser v. City of Homewood, 671 F. 2d 432 (11th Cir. 1982); Heritage Farms Inc. v. Solebury Township, 671 F. 2d 743 (3rd Cir. 1982). The Supreme Court should take this opportunity to determine the parameters of the abstention doctrine in the context of regulatory taking claims.

(3) Application of 42 USC §1983.

Petitioners also alleged that the conspiratorial acts of the City and its officials in restricting petitioners' lands violated 42 USC §1983. The Ninth Circuit's opinion below makes no reference to the civil rights claim even though the matter was argued in the briefs. In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U. S. 391 (1979), this Court acknowledged that a claim for relief would lie against the agency for an alleged deprivation of property rights protected by the due process clause of the Fourteenth Amendment. The relationship between a direct constitutional claim under the Fifth and Fourteenth Amendments and a derivative claim premised upon §1983 has not been decided by this Court. Some circuits have held that a §1983 claim is the exclusive method for reviewing

alleged constitutional deprivations. See, e.g., Turpin v. Mailet, 579 F. 2d 152 (2nd Cir. 1978); Owen v. City of Independence, 589 F. 2d 335 (8th Cir. 1978); see generally Kramer, Section 1983 and Municipal Liability: Selected Issues Two Years After Monell v. Department of Social Services, 12 Urban Law. 232, 233-240 (1980).

The effect of a Section 1983 claim on federal court abstention also remains unresolved. In Heritage Farms, Inc., supra, the Third Circuit found the presence of civil rights claims to be the basis for the exercise of federal jurisdiction in overruling the District Court's decision to abstain because the claims centered around land use.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the

judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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